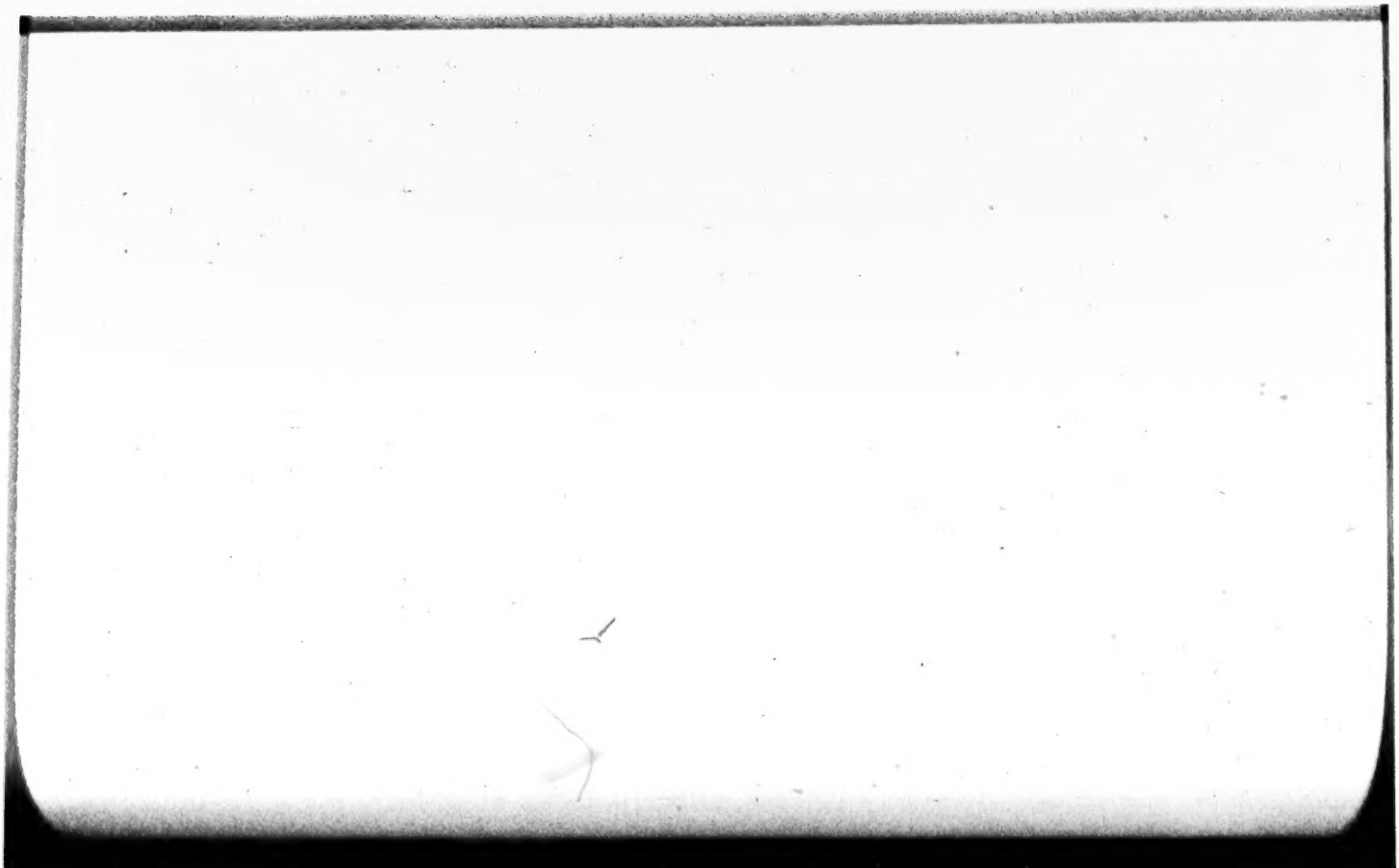

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-831

WARDEN, LEWISBURG PENITENTIARY, *Petitioner,*

v.

BENIGNO MARRERO, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

CONSENT OF THE PARTIES TO FILE AS AMICUS CURIAE

The Washington Lawyers' Committee for Civil Rights Under Law files this brief with the consent of the parties. The parties' letters of consent have been filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized on June 21, 1963, following a conference of lawyers called at the White House by President John F. Kennedy. The Washington Committee was one of 12 regional Committees established in 1968 to pursue the Committee's goal of eliminating discrimination and injustice for minority groups in urban centers. It is a nonprofit private corporation whose principal purpose is to involve private lawyers in Washington, D. C. in the struggle to assure all citizens of their civil rights. During the past three years the Committee has received two grants of Law Enforcement Assistance Administration funds from the D.C. Narcotics Treatment Administration to provide legal services to heroin addicts at various stages of the criminal justice system. The Committee is currently administering the Narcotic Addict Parole Project whereby volunteer lawyers are providing legal representation to individuals eligible for parole. These services continue for six months following release on parole and include efforts to challenge discrimination and due process violations arising from the parole process.

The Committee believes that parole should be available for all sentenced offenders. For this reason, it is filing this brief as amicus curiae.

SUMMARY OF ARGUMENT

In the Comprehensive Drug Abuse Prevention and Control Act of 1970, Congress made a deliberate determination that the prohibition on parole for narcotics offenders served none of the objectives of the criminal

law and, indeed, was counterproductive. The Government advances no rational reason for continuining to prohibit parole after the effective date of the 1970 Act. Thus, the prohibition now constitutes punishment without purpose and creates an irrational distinction between similar classes of narcotics offenders, in violation of due process and equal protection guarantees.

As a matter of statutory construction, the saving clause in the 1970 Act, which speaks of "prosecutions," does not prevent abatement of the prohibition on parole. The 1970 saving clause prevails over the general saving clause, 1 U.S.C. § 109, since it is the latest expression of legislative will.

ARGUMENT

I. As a Matter of Constitutional Law, the Prohibition on Parole Contained in 26 U.S.C. § 7237(d) Cannot Survive the Enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970.

The Comprehensive Drug Abuse Prevention and Control Act of 1970 was enacted "to provide increased research into, and prevention of, drug abuse and drug dependence; *to provide for treatment and rehabilitation of drug abusers and drug dependent persons;* and to strengthen existing law enforcement authority in the field of drug abuse."[1] As part of its effort to achieve these goals, Congress specifically and deliberately ended the prohibition on parole for narcotics offenders, with one narrow exception. Indeed, a primary purpose of the legislation was to eliminate mandatory minimum sentences which barred parole. Senator Thomas Dodd, floor manager of the bill in the Senate, stated:

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[1] P.L. 91-513, preamble (emphasis added).

> "In summation, Mr. President, I believe that the one part of S. 3246 which takes the biggest and best step forward is the new penalty structure we have proposed.
>
> "The main point here was to do away with the mandatory minimum sentence except for the professional criminal involved in a continuous criminal enterprise.[2]

Secretary of HEW Finch, in a letter to Congressman Staggers, Chairman of the House Committee on Interstate and Foreign Commerce, stated:

> "Especially important are the provisions of S. 3246 to make penalties more flexible and more appropriately adopted to various offenses."[3]

The House Report made clear that the new legislation was adopting the position of the two Presidential Commissions—the Prettyman Commission on Narcotics and Drug Abuse (1963) and the Katzenbach Commission on Law Enforcement and Administration of Justice (1966)—which had called for the elimination of the prohibition on parole.[4] The Report stressed "When the penalties involve imprisonment . . . the rehabilitation of the individual, rather than retributive punishment, should be the major objective."[5] Similarly, the Senate Report noted that:

> "The main thrust of the change in the penalty provisions is to eliminate all mandatory minimum sentences for drug law violations except for a spe-

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[2] 116 Cong. Rec. 1654, January 28, 1970.

[3] 3 U.S. Code, Cong. & Admin. News 4634 (1970).

[4] *Id.* at pp. 4584-85, 4587-88.

[5] *Id.* at p. 4575.

> cial class of professional criminals. The field of penology has maintained the position that mandatory sentences hamper the process of rehabilitation of offenders.[6]

Congress recognized that a more flexible penalty structure not only enhanced the process of rehabilitation but also created a more effective system of punishment and deterrence. As the House Report stated:

> "Through the changes in the penalty provisions of existing laws, particularly through elimination of mandatory minimum sentences, the Committee has sought to arrive at a more realistic, more flexible, and thus more effective system of punishment and deterrence of violation of the Federal narcotic and dangerous drug laws."[7]

In short, Congress concluded that all the objectives of the criminal law—rehabilitation, punishment and deterrence—were best served by eliminating the prohibition on parole. The question before the Court is whether there is any rational basis for continuing the prohibition with respect to pre-1971 offenders now—three years after the effective date of the Act[8]—and for many years to come.

It must be emphasized that Congress itself has advanced no reasons for continuing the prohibition. Indeed, as amicus will argue below, the language of the Drug Control Act indicates that Congress did not intend the prohibition to continue. In these circumstances, the Government has been forced to hypothesize

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[6] S. Rep. No. 91-613, 91st Cong., 1st Sess. (1969).

[7] 3 U.S. Code, Cong. & Admin. News 4638 (1970).

[8] The Comprehensive Drug Abuse Prevention and Control Act of 1970 became effective on May 1, 1971.

a reason for continuing the prohibition. The Government points out that the 1970 Act still prohibits parole for those whose narcotics violations are part of a continuing criminal enterprise (21 U.S.C. § 848). Therefore, the Government contends, unless those convicted under the old law remain ineligible for parole, the Parole Board will either have to consider all those so convicted eligible, even those who committed offenses now covered by 21 U.S.C. § 848, or attempt to determine which offenders remain ineligible under the provision of the new law. "Both alternatives" the Government says are "unacceptable."[9]

The Government's argument is without merit for two reasons. First, it is clear that 21 U.S.C. § 848 was intended to be, and is, a narrow exception to the general policy of permitting parole. In fact, the Administrative Office of the United States Courts has no record of any indictments ever having been filed under 21 U.S.C. § 848.[10] If the Government has made little or no effort to use 21 U.S.C. § 848 to bar offenders from parole since 1971, it can hardly argue that the mere existence of 21 U.S.C. § 848 should be used to bar parole for pre-1971 offenders. Second, when reviewing parole applications the Parole Board specifically takes into account the nature and circumstances of the applicant's offense.[11] In effect, therefore, it makes the very

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[9] Brief for Petitioner, pp. 14-15.

[10] Telephone conversation between Joseph Onek, counsel for amicus curiae, and Mrs. Dolores Sawyer, Data Analysis Supervisor, Administrative Office of the United States Courts, March 11, 1974. The Administrative Office collects statistics from every United States District Court.

[11] See 28 C.F.R. 2 § 2, 2 § 15, in 39 Fed. Reg. 26652-53 (1973).

determination contemplated by 21 U.S.C. § 848—*i.e.*, whether the offender is an individual drug abuser or a big-time professional pusher.

The Government is attempting to create an "irrebuttable presumption," blatantly contrary to fact, that all pre-1971 offenders committed acts which would now violate 21 U.S.C. § 848. Such a presumption is particularly inapposite here because a case-by-case approach causes little administrative inconvenience.[12] Indeed, as the Government candidly acknowledges, "neither the Bureau of Prisons nor the Board of Parole believes that it would impede the proper performance of their functions if they were required to consider narcotics offenders convicted under the prior statute eligible for parole under 18 U.S.C. § 4202." [13]

The Government hints at another possible basis for continuing the prohibition by implying that judges might have given some pre-1971 offenders higher sentences if they had known the offenders would be eligible for parole.[14] In fact, this is highly unlikely, since, as the Government itself notes, there was a widespread consensus that penalties under the old law were too severe.[15] More important, the Board of Parole would encourage the submission of advice from sentencing judges before granting parole.[16] Thus, if a

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[12] See *Cleveland Board of Education* v. *LaFleur*, 42 U.S.L.W. 4187 (Jan. 21, 1974); *Vlandis* v. *Kline*, 412 U.S. 441 (1973); *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

[13] Brief for Petitioner, p. 8.

[14] Brief for Petitioner, pp. 19-20.

[15] *Id.* at pp. 13-14.

[16] See 28 C.F.R. 2 § 14, in 39 Fed. Reg. 26653 (1973).

sentencing judge believes that a pre-1971 narcotics offender is being released prematurely, he can so inform the Board of Parole.

In sum, the Government advances no legitimate purpose and provides no rational basis for continuation of the prohibition on parole. *Bradley* v. *United States*, 410 U.S. 605 (1973), is readily distinguishable. In *Bradley*, the issue was whether the prohibition on suspended sentences, probation and court-ordered parole eligibility survived the 1970 Drug Control Act. If it were held that, as a constitutional matter, the prohibition did not survive, every offender convicted under the old law would have been eligible for a new sentencing hearing in the district court. Certainly, it would be reasonable for Congress to seek to avoid this violent breach of the concept of finality in the criminal process. Indeed, one of the primary purposes of saving clauses is precisely to uphold the concept of finality. See, *e.g.*, *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. PA. L. REV. 120, 145-46 and *passim* (1972). Thus, there was a legitimate purpose and rational basis for the congressional decision in the 1970 Act to bar probation and court-ordered parole eligibility.

In the instant case, however, Congress would not be supporting the concept of finality by continuing the prohibition on parole. The Parole Board has never ruled on any of the pre-1971 offenders. And, as noted earlier, "neither the Bureau of Prisons nor the Board of Parole believes that it would impede the proper performance of their functions if they were required to consider narcotics offenders convicted under the prior statute eligible for parole under 18 U.S.C. § 4202."

Pipefitters v. *United States,* 407 U.S. 385 (1972), and similar cases are also readily distinguishable. In those cases, it was claimed that certain conduct ceased to be criminal under the new law. But Congress nevertheless had two legitimate reasons for requiring prosecution of persons who had violated the old law: first, to punish them for being lawbreakers and second, to deter people from violating a particular law whenever it seems likely that the law will be repealed in the near future.[17] Neither of these reasons apply to the instant case. Here the conduct proscribed under the old law is also proscribed under the new law. Indeed, as the Government forcefully points out, the more flexible penalty structure of the new law was designed to increase the likelihood that narcotics offenders would receive their just punishment.[18] Thus, the deterrence objective is inapplicable here because there was never even the remotest possibility that narcotics offenders would escape punishment under the new law. And the punishment objective is inapplicable here because all lawbreakers are being punished.

In short, in the instant case, unlike in *Bradley* or *Pipefitters,* the punishment sought to be imposed—the prohibition on parole—serves no legitimate purpose. In *Hamm* v. *City of Rock Hill,* 379 U.S. 306, 313 (1964), the Court stated that there was a general principle "of imputing to Congress an intention to avoid inflicting

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[17] This deterrence function is particularly crucial with respect to such legislation as price controls or rationing which everyone knows will be repealed in relatively short order. Unless it is clear that prosecutions will continue after repeal, many people will believe they can violate the law with impunity. See, *e.g., Allen* v. *Grand Central Aircraft Co.,* 347 U.S. 535 (1954); *Bowen* v. *United States,* 171 F.2d 533 (5th Cir. 1948).

[18] Brief for Petitioner, pp. 13-14.

punishment at a time when it can no longer further a legitimate purpose and would be unnecessarily vindictive." This principle certainly rises to constitutional dimensions: punishment without purpose is repugnant to due process.

The constitutional issue in this case can be framed in another way. If pre-1971 offenders are barred from parole, there are now two classes of offenders similar in every respect except that one class is eligible for parole and the other is not. As argued above, there is no legitimate objective served by the distinction between the two classes. Thus, the distinction violates the equal protection guarantees embodied in the Fifth Amendment. See *Bolling* v. *Sharpe,* 347 U.S. 497 (1954).

The contrast with *Marshall* v. *United States,* 91 U.S.L.W. 4121 (Jan. 9, 1974), is both sharp and instructive. In that case, all the Justices agreed that the statutory provision at issue, the NARA two felony exclusion, had a legitimate purpose—to exclude from NARA treatment those convicted persons less likely to be rehabilitated by such treatment. The question which divided the Court was whether the two felony exclusion was a sufficiently rational means towards that legitimate end. In the instant case, on the other hand, the continued prohibition on parole lacks a legitimate purpose and was not even expressly required by the statute.

Although the Court below did not specifically address the constitutional issue, in essence it adopted the position advanced here. The Court stated:

> . . . we can find *no rational basis* that would justify barring parole for persons convicted of crimes

committed before the Act's effective date, yet granting it to persons convicted of subsequent crimes. To the extent parole aids prisoner rehabilitation and consequently strengthens the tensile fabric of society, it is important that we avoid technical, *purposeless* construction which runs counter to the congressional plan to encourage prisoner rehabilitation." [19]

Similarly, the Fourth Circuit recently concluded

> It is obvious that Congress, in removing the ban on administrative parole for narcotic law offenders in the Comprehensive Act of 1970, was expressing a judgment that an intelligent program of rehabilitation, in which administrative parole should be an available tool, was the preferred method of dealing with such offenders. If that was the Congressional purpose, it is difficult to find any basis in that Act, *much less in reason or in fairness,* for treating differently prisoners whose narcotic law offenses took place before May 1, 1971 from those whose offenses occurred after that date. *We will not assume that Congress intended any such irrational purpose or intent.*[20]

In essence, both the Third and Fourth Circuits have concluded that the continued prohibition on parole cannot be squared with the rationality requirement of the due process clause of the Fifth Amendment. Particularly given Congress' failure to advance any reasons for continuing the prohibition, this Court should reach the same conclusion.

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[19] *Marrero* v. *Warden, Lewisburg, Pen.*, 483 F.2d 656, 663 (3rd Cir. 1973) (emphasis added).

[20] *Alvarado* v. *McLaughlin*, 386 F.2d 541, 544-45 (4th Cir. 1973) (emphasis added).

II. As a Matter of Statutory Construction, the Prohibition on Parole Contained in 26 U.S.C. § 7237(d) Does Not Survive the Enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970.

In *Bradley* v. *United States, supra,* the Court held that pre-1971 narcotics offenders are not entitled to probation or court-offered parole eligibility by virtue of the Drug Control Act of 1970. The Court relied solely on the saving clause in the new Act itself which provides that "Prosecutions for any violation occurring prior to the effective date of [the new statute] shall not be affected by the repeals or amendments made by [the statute] . . . or abated by reasons thereof." Pub. L. No. 91-513, § 1103(a). The Court held that the term "prosecution," when read in its "familiar legal sense," included sentencing and that sentencing included decisions as to probation and as to parole pursuant to 18 U.S.C. § 4208. 410 U.S. at 609. The Court concluded therefore that the prohibitions against probation and court-ordered parole eligibility were not abated by the new statute. 410 U.S. at 609-611.

The availability of parole under the general parole statute, 18 U.S.C. § 4202, raises different questions, as the *Bradley* Court recognized. 410 U.S. at 611. Such parole is decided upon by the Board of Parole, not a court, long after the sentence has been imposed. Clearly, such parole is not part of prosecution or sentencing as those terms are used in the "familiar legal sense." See *Morrisey* v. *Brewer,* 408 U.S. 471, 480 (1972), where the Court stated that "Parole arises after the end of the criminal prosecution, including imposition of sentence." Amicus contends, therefore, that the saving clause of the Drug Control Act does not save the provision of 26 U.S.C. § 7237(d) which bars parole under 18 U.S.C. § 4202.

The Government argues that parole under section 4202 can be regarded as part of prosecution and sentencing because the trial judge, in setting the sentence, in effect establishes when the offender will first become eligible for parole.[21] But this argument ignores the crucial fact that once the judge has imposed sentence, the offender can only obtain relief from a non-judicial body, the Parole Board, which considers post-sentence as well as pre-sentence information.[22] This fact has two significant consequences. First, it means that, in the "familiar legal sense," the offender is no longer involved in the judicial processes of prosecution and sentencing. Second, it means that the judge is not required to reopen his sentencing decision if it is held that the bar on parole is not saved by Section 1103(a). Thus, as amicus has argued above, no breach in the concept of finality is created if the bar on parole is lifted. *Bradley* is distinguishable precisely on this point.

The Government also relies on the general saving clause, 1 U.S.C. § 109. The language of the general saving clause may conceivably be broad enough to prevent abatement of the no-parole provision. But amicus contends that the general saving clause, which was not mentioned in the opinion of the Court in *Bradley,* is not applicable in this case because of the existence of the narrower saving clause in the Drug Control Act. In *Hertz* v. *Woodman,* 218 U.S. 204, 218 (1910), the Supreme Court stated "The repealing act here involved includes a saving clause, and if it necessarily, or by clear implication, conflicts with the general rule declared in [the general saving clause],

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[21] Brief for Petitioner, p. 19.

[22] See 28 C.F.R. 2 § 2, 2 § 14, 2 § 15, in 39 Fed. Reg. 26652-53 (1973).

the latest expression of legislative will must prevail." The Court then examined whether the saving clause in the repealing act "by plain implication cuts down the scope and operation of the general rule . . . ." *Ibid.* In the instant case, the saving clause of the repealing act, which speaks only of "prosecutions", cuts down the scope of the general saving clause, which speaks of "any penalty, forfeiture or liability." And since the saving clause of the new act is the latest expression of the legislative will, it must prevail.

Amicus emphasizes that there is no reason to regard the narrower language of the specific saving clause as mere accident. Congress enacts saving clauses frequently, and usually tracks the language of the general saving clause quite closely. See, *e.g.*, the saving clauses discussed in *Duffel* v. *United States,* 221 F.2d 523, 524 (D.C. Cir. 1954); *Hiatt* v. *Hilliard,* 180 F.2d 453, 455 (5th Cir. 1950); *United States* v. *Kirby,* 176 F.2d 101, 104 (2d Cir. 1949); and *Lovely* v. *United States,* 175 F.2d 312, 316 (4th Cir. 1949), all of which provide that any "liabilities" shall not be affected by repeal.

Moreover, as already noted, there is good reason why Congress might choose to treat abatement of a bar on probation and court-ordered parole eligibility differently from abatement of a bar on general parole. Abatement of the bar on general parole does not require numerous court rehearings and thus does not breach the concept of finality.

If there is any ambiguity as to the congressional intent, it should be resolved in favor of lenity. In *Bell* v. *United States,* 349 U.S. 81, 83 (1965), Mr. Justice Frankfurter, speaking for the Court, said:

> "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the

> ambiguity shall be resolved in favor of lenity. And this is not out of any sentimental considerations, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presumption of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment."

Finally, as argued in Section I of this brief, an interpretation of the Drug Control Act which continues the prohibition on parole raises serious constitutional questions. This Court should avoid interpreting the statute in a manner which casts doubts on the constitutionality of Congress' action. See, *e.g., Crowell* v. *Benson,* 285 U.S. 22, 62 (1932).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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